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Supreme Court of the United States

OCTOBER TERM, 1979
No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN MCCARTHY,

Appellants,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN MCCARTHY,

Appellants,

—v.—

RICHARD H.C. TAYLOR,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN MCCARTHY,

Appellants,

—v.—

RICHARD H.C. TAYLOR,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE COMMONWEALTH OF VIRGINIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA IN SUPPORT OF JURISDICTIONAL STATEMENT. *AMICUS CURIAE*

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA IN SUPPORT OF JURISDICTIONAL STATEMENT, AMICI CURIAE

Interest of Amici Curiae*/

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*/ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

For fifty-nine years, the American Civil Liberties Union and its state affiliates, including amicus ACLU of Virginia, have devoted themselves to protecting the civil liberties of the American people. Public trials are among the constitutional safeguards which secure these liberties of a free people. Public scrutiny of the trial process helps to ensure that the great power of the criminal law operates fairly and responsibly under the watchful eye of those for whom it is exercised. Accordingly, hand in hand with its commitment to fair trials -- the ACLU joined in Sheppard v. Maxwell, 384 U.S. 333 (1966), urging that the petitioner had been deprived of his Sixth Amendment right to a verdict untainted by prejudicial publicity -- the ACLU has also supported the right of the public and the press to attend criminal trials. See Brief of the American Civil Liberties Union, Amicus Curiae, Gannett Co., Inc. v. DePasquale, No. 77-1301 (1978 Term).

The ACLU, moreover, has a special interest in the questions presented here. In the wake of Gannett v. DePasquale, 61 L. Ed.2d 608 (1979), the United States moved to close the entire appellate argument in the Seventh Circuit in the

government's prior restraint case against The Progressive Magazine, whose editors are represented by ACLU attorneys.[1] The Gannett decision is being misapplied in numerous other cases throughout the country as well, and ACLU affiliates are involved in many of those cases. Even if those misapplications of Gannett are eventually corrected by appellate courts, public rights will be unjustifiably abridged in the meanwhile. As this Court has frequently recognized, time is often of the essence in reporting news; and a journalistic summary of a cold appellate transcript, months after decision is rendered, can hardly substitute for immediate public attention to and criticism of the arguments of its public servants in the public's courts.

The ACLU rarely files amicus briefs in support of jurisdictional statements. However, never, to amici's knowledge, had any American court undertaken to close an entire criminal trial to the public, before this Court's decision in Gannett. The

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1. The Progressive case has already been before this Court. See Morland v. Sprecher, No. 78-1904, 47 U.S.L.W. 3838 (July 2, 1979).

unprecedented trial closing of the Virginia trial court here, part of a wave of closed judicial proceedings spawned by widespread confusion and misunderstanding of this Court's decision in Gannett, compels us to depart from our customary practice. Amici urge the Court to note probable jurisdiction so that it can clarify the Gannett decision, decide the First Amendment question which Gannett expressly did not reach, and vigorously affirm our nation's constitutional commitment to public scrutiny of the administration of justice in our nation's courts.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE OF NATIONWIDE SIGNIFICANCE.

Three months after this Court's decision in Gannett v. DePasquale, 61 L. Ed.2d 608 (1979), it is apparent that the Gannett decision is having a profound effect on the administration of criminal justice. Thirty years ago, this Court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." In re Oliver, 333 U.S. 257, 266 (1948)(footnote omitted). Yet, since Gannett, courts throughout the nation, suddenly freed from what had heretofore been perceived as a constitutional requirement, have suddenly begun closing pretrial proceedings, trials, and post conviction proceedings as a matter of course. Verdicts have been announced in camera; charges dropped without public explanation, as in this case;[2/] guilty pleas accepted behind

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2/ The trial court granted defendant's motion to strike all the government's evidence. See Jurisdictional Statement, App. N. The grant
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closed doors.[3/]

Whatever the merits of Gannett on the facts there presented, it is already apparent that the Court's holding there has been stretched beyond its intended meaning. Although Gannett addressed only the Sixth and Fourteenth Amendment rights of the public in criminal proceedings, explicitly reserving First Amendment questions, see 61 L. Ed.2d at 629, the Virginia Supreme Court in this case, like other courts throughout the nation, has read Gannett to justify closing an entire trial. Moreover, whereas Gannett required

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of such a motion suggests possible governmental impropriety, in which the public surely has an interest. However, because the trial was held in secret, the grounds upon which the motion was granted, and therefore, the presence of any impropriety, remain unknown.

3/ The gravity of accepting secret guilty pleas can be better appreciated by considering the impact acceptance of secret pleas in the original Watergate burglary trials would have had on American political history. The presence of the public and the press at both the pretrial and the trial stages must be credited with aiding the effective administration of justice. See Sheppard v. Maxwell, 384 U.S. at 350. See also Gannett v. DePasquale, 61 L. Ed.2d at 642 (Blackmun, J. dissenting).

a showing that public proceedings would pose "a reasonable probability of prejudice to these defendants," id., and relied on the "temporary" nature of the ban imposed there, id., the closing of the entire trial in this case was made without any showing of prejudice.[4/]

4/ At the time the trial was closed the court had made no findings whatsoever, a procedure which is patently insufficient to protect the important public interests involved. Thereafter, the trial judge entertained argument by the intervenor-newspapers, who properly contended that even if the potential harm, as alleged by defense counsel, had been shown, the court could only close the trial upon finding that less drastic alternatives were unavailable. The court's "findings," rejecting those arguments, were wholly inadequate. The reasons given by the court for closure were "distract[ion] to the jury" from public attendance -- a reason presumably applicable to every court and trial in the nation -- and prophylactic protection of the defendant's rights. See Jurisdictional Statement, App. E at 16a. Although the court's motivation is noteworthy, its method was excessive.

II. GANNETT HAS SPAWNED CONFUSION AND INCONSISTENT DECISIONS THROUGHOUT THE LOWER COURTS, AND THEREFORE REQUIRES PROMPT CLARIFICATION.

The Virginia courts have read Gannett to sanction the exclusion of the public from entire criminal trials. They are not alone in that interpretation. As the Brief Amicus Curiae of the Reporter's Committee for Freedom of the Press demonstrates, an increasing number of courts are closing trials on the sole authority of Gannett. See Brief of Reporter's Committee for Freedom of the Press, Amicus Curiae, passim, and Appendix A. The broad language of the majority opinion in Gannett, joined by five members of the Court, did not preclude, and virtually invited such an interpretation. Indeed, the Justices' disagreement over Gannett's reach and meaning has continued publicly, months after the opinion was issued, with four Justices commenting openly on the decision's meaning. See. e.g., "Stevens Says Closed Trials May Justify New Laws." New York Times, Sept. 9, 1979, at 41. It is not surprising, therefore, that lower courts

have disagreed as to the reach of Gannett and have issued conflicting opinions.

This state of uncertainty jeopardizes the equal and efficient administration of justice, and the important public interests in open trials that both the dissenters and the majority recognized in Gannett. The number of cases in which defense counsel may make Gannett closing motions is without limit. Challenges by press and public to such motions absorbs important judicial time and energy. Uncertainty as to the correct standards increases the courts' burdens and where such challenges are precluded because of expense, or failure to file timely notice,[5/] trials wrongfully closed based upon the supposed authority of Gannett may escape review entirely.

5/ Where members of the public or press, for a variety of understandable reasons, decide against attending a trial at its commencement, a real "Catch-22," under one reasonable interpretation of Gannett, may result: a notice to challenge the order cannot be filed because the person wishing to enter the courtroom did not happen already to be there when the closure order is issued and cannot thereafter file a challenge because the courtroom is closed. See Gannet, 61 L.Ed.2d at 635 (Powell, J. concurring).

To avoid these dangers, and much unnecessary litigation, review of this case is essential. The Court should address the following pressing questions raised by the decision below and by inconsistent decisions in other courts:

1. whether the public or press have any presumptively protected rights of access under the Sixth Amendment as to criminal trials (not pretrial proceedings);

2. whether the public and the press have presumptively protected rights of access under the First Amendment, or other constitutional provisions not addressed in Gannett;

3. whether trials may be closed in the absence of a record finding prejudice to the defendant were an open trial to proceed, or without a finding that no less drastic alternatives would suffice:

4. whether "distract[ion] to the jury" from the presence of the public in a courtroom is a sufficient justification for closing a trial; and

5. whether trials may be closed, in the absence of a finding of harm to defendant's rights, simply to assure prophylactically that "the rights of the defendant are [not] infringed in any way" (see Jurisdictional Statement, App. E at 16a).

III. THE GANNETT DECISION LEAVES UNRESOLVED THE IMPORTANT QUESTION OF WHETHER THE FIRST AND THE FOURTEENTH AMENDMENTS PRESUMPTIVELY PROTECT PUBLIC RIGHT OF ACCESS TO CRIMINAL TRIALS.

Another issue of great importance presented by this appeal is whether the public has a right of access to criminal proceedings under the First and the Fourteenth Amendments. Although the issue of the public's right of access, in general, and that of the press, in particular, has been raised in other cases before this Court, the Court has never resolved those questions. It should do so here.

The importance of these questions is now manifest. Under our constitutional system of separation of powers, open trials have "been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." In re Oliver, 333 U.S. at 270. See also, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

Moreover, apart from their value in maintaining proper checks and balances on the judicial and executive branches, open trials have long been recognized as critically important in maintaining the integrity of the criminal justice system, through, for example, decreasing the risk of perjury. See Gannett, 61 L. Ed.2d at 648-49 (Blackmun, J., dissenting).

The question of whether there is a First Amendment right of access to criminal proceedings was not resolved in Gannett. Mr. Justice Stewart, speaking for the majority, explicitly reserved the question:

> "Petitioner in this case urges us to narrow our rulings at least to the extent of recognizing a First and Fourteenth Amendment right to attend criminal trials. We need not decide in the abstract, however, whether there is any such constitutional right . . . [whether] the First and Fourteenth Amendments may guarantee access in some situations, [is] a question we do not decide . . . ."

61 L. Ed.2d at 629.[6/] [Citations and

6/ Adding still further to the confusion of the bench and the bar concerning the Gannett decision, are the concurring and dissenting

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footnote omitted.]

Nor did earlier cases touching on the right of public access to government information resolve the question raised here -- whether there is a First Amendment right to attend criminal trials -- and its scope if such a right exists. Although the Court in

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justices' own interpretations of the First Amendment question reserved by the Court. Mr. Justice Rehnquist, in his concurring opinion, stated:

> "Despite the Court's seeming reservation of the question whether the First Amendment guarantees the public a right of access to pretrial proceedings, it is clear that this Court repeatedly has held that there is no First Amendment right to access in the public or the press to judicial or other government proceedings."

61 L. Ed.2d at 637 [Citations omitted]. On the other hand, Mr. Justice Powell would have held specifically that the First and Fourteenth Amendments protect the right of the public and the press to attend criminal proceedings. Id. at 632. Mr. Justice Blackmun, with whom Justices Brennan, White and Marshall joined, stated: "Despite Mr. Justice Powell's concern, ante, this Court heretofore has not found and does not today find, any First Amendment right of access to judicial or other governmental proceedings." Id. at 641.

Branzburg v. Hayes, 408 U.S. 665, 707 (1972) found that news gathering was entitled to some First Amendment protection, and although the Court has frequently struck down restrictions directed at press reporting of information of public concern, see, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Court has not found a First Amendment right of access to information within the government's exclusive control. See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) and Pell v. Procunier, 417 U.S. 817, 834 (1974). On the other hand, the history of public access to trials, dating back to the beginnings of Anglo-Saxon law, suggests that the public's right to attend criminal trials may be far different in origin and scope from an asserted right to government information generally.

In addition to the First Amendment question reserved in Gannett, other constitutional sources suggest themselves as bases upon which a public right to attend criminal trials may be predicated.[7/] These other

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7/ The Court recognized the existence of rights which, although not specified in an express constitutional provision, have been found to be "necessary to an Anglo-American (FN 7 continued on next page)

sources should be fully addressed by this Court before lower courts proceed to alter permanently the public character of trials under mistaken interpretations of Gannett. See generally, 61 L. Ed.2d at 638 (Blackmun, J. dissenting). Indeed, because the right of publid access to criminal trials is so important and of such long standing in the Anglo-American legal tradition, the right may be recognized as a constitutional right even in the absence of a specific constitutional provision.

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regime of ordered liberty," Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968), or one of the privileges or immunities of national citizenship. See Edwards v. California, 314 U.S. 160 (1941). See generally, Tribe, American Constitutional Law at 415-521 (1978). For example, the Court recognized the right not to be convicted without proof beyond a reasonable doubt, Mullaney v. Wilbur, 421 U.S. 684 (1975), and In Re Winship, 397 U.S. 358 (1970); the right of privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); the right to vote in state elections, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); and the right to travel interstate, see United States v. Guest, 383 U.S. 745 (1966).

CONCLUSION

This Court has declared on a prior occasion, "A trial is a public event. What transpires in the court is public property." Craig v. Harney, 331 U.S. 367 at 374 (1947). The decisions in the instant case and that of Gannett v. DePasquale, raise important and serious questions about the continued vitality of the public trial. For this and the foregoing reasons, the Court should note probable jurisdiction and set this appeal for argument on the merits.

Respectfully submitted,

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